

ALBERTA

**OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER**

ORDER P2005-006

January 18, 2007

CANADA SAFEWAY LIMITED

Case File Number P0071

Office URL: <http://www.oipc.ab.ca>

Summary: The Complainant, an employee of another food retail chain, entered a store of Canada Safeway Limited (the “Organization”) while wearing her employee uniform. The Complainant gathered several goods, paying for some and not for others. When the Complainant left the store, security for the Organization stopped the Complainant and accused the Complainant of theft. The unpaid items were returned and the police were notified. Upon review of the incident, no charges were laid.

The Organization, without the consent of the Complainant, advised the Complainant’s employer about the incident. As a result the Complainant was dismissed. The Complainant initiated a complaint with the Office of the Information and Privacy Commissioner, and the matter proceeded to a written inquiry. The Organization argued that it did not require consent to disclose personal information of the Complainant under section 7(1)(d) (consent to disclose) of the *Personal Information Protection Act*, (the “Act”) as the section is contrary to section 2(b) (freedom of expression) of the *Canadian Charter of Rights and Freedoms* (the “Charter”). The Organization also argued that if it is found that section 7(1)(d) of the Act is not contrary to the *Charter*, then section 20(b) (disclosure pursuant to a statute of Canada that authorizes or requires disclosure) of the Act and section 20(m) (disclosure reasonable for investigation or legal proceeding) of the Act apply and permit the disclosure of the Complainant’s personal information.

The Commissioner found that section 7(1)(d) of the Act did not contravene section 2(b) of the *Charter*; that sections 20(b) and 20(m) of the Act did not authorize the Organization to disclose the Complainant’s personal information without consent; and that the Organization disclosed the Complainant’s personal information contrary to section 7(1)(d) of the Act.

Statutes Cited: *Administrative Procedures Amendment Act*, S.A. 2005, c. A-3; *Canadian Charter of Rights and Freedoms*, s.15; Part I of the *Constitution Act*, 1982 being Schedule B to the *Canada Act* (U.K.), c.11, ss. 1, 2(b); *Criminal Code*, R.S.C. 1985, c. C-46; *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000 c. F-25, s. 1(n); *Judicature Act*, R.S.A. 2000, c. J-2, s. 24(1); *Personal Information Protection Act*, S.A. 2003, c. P-6.5, ss. 7(1)(d), 20(b), 20(m).

Order Cited: AB: F2002-024.

Cases Cited: *Hunter v. Southam*, [1984] 2 S.C.R. 145; *R. v. Oakes* (1986), [1986] 1 S.C.R. 103; *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 2 S.C.R. 927; *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 42; *R. v. Duarte* [1990] 1 S.C.R. 30; *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)* [1991] 2 S.C.D. 5; *Lavigne v. Ontario Public Services Employees Union*, [1991] 2 S.C.R. 211; *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. O’Conner* [1995] 4 S.C.R. 411; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 199; *Aubry v. Editions Vice Versa Inc.*, [1998], 1 S.C.R. 591; *Law Society British Columbia v. Mangat* [2001] 3 S.C.R. 133; *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585; *Nova Scotia (Workers’ Compensation Board) v. Martin* [2003] 2 S.C.R. 504.

I. BACKGROUND

[para 1] The Complainant, an employee of another food retail chain, entered a store of Canada Safeway Limited (the “Organization”) while wearing her employee uniform. The Complainant gathered several goods, paying for some and not for others. When the Complainant left the store, security for the Organization stopped the Complainant and accused the Complainant of theft. The unpaid items were returned and the police were notified. Upon review of the incident, no charges were laid.

[para 2] The Organization, without the consent of the Complainant, advised the Complainant’s employer about the incident. As a result the Complainant was dismissed.

[para 3] The Complainant initiated a complaint with my Office, under section 46(2) (right to ask for a review or initiate a complaint) of the *Personal Information Protection Act* (the “Act”) alleging that the Organization wrongfully disclosed her personal information contrary to section 7(1)(d) (consent to disclose) of the Act.

[para 4] Mediation, authorized under section 49 of the Act, failed and the matter proceeded to a written inquiry under section 50 of the Act.

[para 5] The Organization argued that it did not require consent to disclose personal information under section 7(1)(d) of the Act as the section is contrary to section 2(b) (freedom of expression) of the *Canadian Charter of Rights and Freedoms* (the “Charter”). The Organization also argued that if it is found that section 7(1)(d) of the

Act is not contrary to the *Charter*, then section 20(b) (disclosure pursuant to a statute of Canada that authorizes or requires disclosure) of the Act and section 20(m) (disclosure reasonable for investigation or legal proceeding) of the Act apply and allow the disclosure of the Complainant's personal information.

[para 6] As the Organization raised a *Charter* issue, the Organization was required to give notice, under section 24(1) of the *Judicature Act*, to the Attorney General of Canada and to the Minister of Justice and Attorney General of Alberta. The Organization, pursuant to Part 3 of the *Judicature Act*, was also required to provide evidence that it had given notice, and to provide me with the responses. The Attorney General of Alberta joined the inquiry and provided written submissions concerning the *Charter* issue.

II. RECORDS AT ISSUE

[para 7] As this matter concerns a complaint about a disclosure of personal information, there are no records at issue.

III. ISSUES

[para 8] The Notice of Inquiry set out the following issues for the inquiry:

Was the Organization authorized to disclose the Complainant's personal information without consent, as provided by section 20(m) of the Act (disclosure reasonable for investigation or legal proceeding)?

If the Organization was not authorized to disclose as provided by section 20(m), was the Organization authorized to disclose the Complainant's personal information without consent, as provided by section 20(b) of the Act (disclosure pursuant to a statute of Canada that authorizes or requires disclosure)?

Note: For the purposes of section 20(b) of the Act, the statute of Canada is the "*Constitution Act*", 1982, Part I *Canadian Charter of Rights and Freedoms*.

Is the requirement for consent to disclose personal information under section 7(1)(d) of the Act contrary to section 2(b) (freedom of expression) of the *Canadian Charter of Rights and Freedoms*?

[para 9] As the outcome of the first two issues will be impacted by my decision regarding the *Charter* issue, I will therefore address the *Charter* issue first.

IV. DISCUSSION OF THE ISSUES

ISSUE A: Is the requirement for consent to disclose personal information under section 7(1)(d) of the Act contrary to section 2(b) (freedom of expression) of the *Canadian Charter of Rights and Freedoms*?

My jurisdiction to decide *Charter* questions

[para 10] I note that at the time of this inquiry (November 2005) the *Administrative Procedures Amendment Act* (“APAA”) (Bill 23) was not in force. The APAA specifies which Alberta tribunals will have the authority to decide questions pertaining to the application of the *Charter*.

[para 11] The Complainant argued that under section 50 of the Act, the Commissioner has the authority and express jurisdiction to decide all questions of fact and law arising in the course of an inquiry. The transitional provisions in section 15 of the APAA allow the Commissioner to proceed as if the APAA did not come into force.

[para 12] The Organization, referencing *Cuddy Chicks Ltd. v. Ontario (Labour Relations Board)*, [1991] 2 S.C.D. 5, argued that section 50(1) of the Act gives the Commissioner jurisdiction in relation to this inquiry and that he has the power to make a determination if the Act is constitutionally valid.

[para 13] The Alberta Minister of Justice and Attorney General (“Alberta”) argued that the Commissioner currently has the jurisdiction to determine *Charter* questions: see the *Paul v. British Columbia (Forest Appeals Commission)*, [2003] 2 S.C.R. 585 and *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 cases. Alberta also argued that if the APAA was in force, section 15 of APAA allowed the Commissioner to proceed.

[para 14] I agree with all of the submissions that at the time of this inquiry I have jurisdiction to decide *Charter* questions.

The parties’ *Charter* arguments

[para 15] Section 7(1)(d) of the Act reads:

7(1) Except where this Act provides otherwise, an organization shall not, with respect to personal information about an individual,...

(d) disclose that information unless the individual consents to the disclosure of that information.

[para 16] Section 2(b) of the *Charter* reads:

2. Everyone has the following fundamental freedoms:...

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication; ...

[para 17] The Organization did not dispute the fact that it shared the personal information of the Complainant with her employer. The Organization argued that the disclosure of the personal information to the Complainant's employee is protected as a fundamental freedom of expression under section 2(b) of the *Charter*. The Organization noted that it was prepared to accept that the Commissioner has a concurrent power to determine whether the Act is constitutionally valid and requested that the privacy complaint be dismissed.

[para 18] The Organization argued that the *Charter* sets out the rights and freedoms that establishes for all Canadians protection of certain basic rights and freedoms essential to maintaining our united, free and democratic society. The Organization noted that the *Charter* applies to all governments (federal, provincial and territorial).

[para 19] The Organization contended that section 7(1)(d) of the Act restricts its freedom of expression. The Organization turned to *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 2 S.C.R. 927 ("*Irwin*") and argued that the definition of "expression" is broad and therefore the disclosure by the Organization concerning the Complainant's shopping incident falls within the scope of freedom of expression guaranteed by the Charter. The Organization argued that the disclosure was based on one of the fundamental principals underlying freedom of expression, being the principal that seeking and attaining the truth is an inherently good activity.

[para 20] The Organization argued that while the objective of section 7(1)(d) of the Act addresses a pressing and substantial concern, it does not, for the purposes of section 1 of the *Charter*, warrant overriding the right of the Organization to freedom of expression.

[para 21] The Organization reasoned that the decision to disclose the personal information of the Complainant was a natural consequence of the action of the Complainant and, as such, she should not enjoy the protection of the Act.

[para 22] The Organization argued that section 7(1)(d) of the Act is more than a minimal interference with the fundamental right of expression by the Organization. The Organization argued further that section 7(1)(d) of the Act is not saved by section 1 of the *Charter*. Section 1 of the *Charter* reads:

The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[para 23] The Organization observed that, placed in the proper context, the Organization is not seeking to publish information, either journalistically or artistically, as in the cases of freedom of expression and privacy. The Organization asked for

recognition of its right to express to the Complainant's employer the incident surrounding their investigation into shoplifting and concluded that section 7(1)(d) of the Act contravenes section 2(b) of the *Charter*.

[para 24] The Complainant noted that the *Charter* is applicable to the legislative, executive and administrative branches of the government, and as such, all laws and regulations, including the Act, are subject to the scrutiny of the *Charter*.

[para 25] The Complainant argued that the Organization, without her consent, disclosed her name and personal information about the shopping incident to her employer. The Complainant argued that clearly section 2(b) of the *Charter* does not specifically require or authorize an organization to disclose personal information. The Complainant contended that the question, for these circumstances, is: Does section 2(b) of the *Charter* impliedly authorize the Organization to disclose her personal information to a third party without consent and thereby make the application of section 7(1)(d) of the Act contrary to the *Charter*?

[para 26] The Complainant claimed she could not find direct case law addressing corporate freedom of expression, namely the non-consensual disclosure of personal information, from one organization to another. The Complainant argued that the Supreme Court of Canada decisions that address corporate freedom of expression are restricted to purely commercial expressions found in advertising and even this freedom of expression was not without criticism. The Complainant could not find a decision that was analogous to the disclosure of personal information.

[para 27] The Complainant argued that to determine if an expression is within section 2(b) of the *Charter* the Supreme Court of Canada, in *Irwin*, provided a test. The test is set out in steps.

[para 28] One step the Complainant noted is the need to assess whether the activity is within the sphere of conduct protected by freedom of expression. The Complainant observed that this step allows for all forms of individual (human) expression except human activity that is purely physical and done not to convey or attempt to convey meaning or express activity that takes the form of violence. The Complainant argued that the core values associated with freedom of expression are self-fulfillment, participation in social and political decision-making and the commercial exchange of ideas coupled with the need to ensure that the truth and the common good are attained.

[para 29] The Complainant argued that this first step does not apply to one organization disclosing personal information to another, as there is not even a tenuous connection to the core values which promote freedom of expression as outlined by the Supreme Court of Canada in *Irwin*.

[para 30] Another step in the *Irwin* test is to determine whether the purpose or effect of the government action is to restrict freedom of expression.

[para 31] The Complainant argued that the purpose of the Act is to govern the disclosure of personal information by organizations in a manner that recognizes the right of an individual to have his or her personal information protected accompanied by the need of organizations to disclose personal information for purposes that are reasonable.

[para 32] The Complainant argued that the object of section 7(1)(d) of the Act is to prohibit the disclosure of personal information unless that person consents, subject to various exceptions and conditions of reasonableness. In addition the Complainant contended that the Act is not restricting the content of expression by singling out particular meanings that are not to be disclosed.

[para 33] The Complainant submitted that if the Commissioner finds that section 2(b) of the *Charter* applies, then section 7(1)(d) of the Act is saved by section 1 of the *Charter* as section 7(1)(d) is a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

[para 34] The Complainant argued that in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the Supreme Court of Canada has taken the contextual approach to a section 1 of the *Charter* analysis and that there is a more relaxed standard of scrutiny where the legislation represents an attempt to protect a vulnerable group or reconcile competing claims, and should only be restricted to reasonable limits.

[para 35] The Complainant contended that in *Irwin* the Supreme Court of Canada determined that to be prescribed by law, a statute need not be absolutely precise and will only be void for vagueness if it provides no intelligible standard and has given plenary discretion to do whatever seems best in a wide set of circumstances. The Complainant contended that section 7(1)(d) of the Act, when interpreted in accordance with the modern principle of statutory interpretation (being that the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme and object of the Act, and the intention of Parliament-see, *Rizzo & Rizzo Shoes Ltd.* [1998] 1 S.C.R. 199, 127) places a limit on the freedom of expression of the Organization, that is not vague and is prescribed by law.

[para 36] The Complainant addressed the test found in *R. v. Oakes* (1986), [1986] 1 S.C.R. 103 (“*Oakes*”) used by the Supreme Court of Canada to determine whether a law that infringes the *Charter* is sufficiently reasonable and demonstrably justifiable so as to be saved under section 1 of the *Charter*.

[para 37] The Complainant contended that the first step is to show which measures of the limit must be of sufficient importance to warrant overriding a *Charter*, protected freedom. The Complainant argued that the Act protects personal information and the *Charter* gives constitutional protection to the right of privacy: see *R. v. O’Conner* [1995] 4 S.C.R. 411. Section 7(1)(d) of the Act has the objective of protecting the constitutionally protected privacy rights of individuals. The second step, noted by the Complainant, is that the measures adopted to achieve the objective (protection of privacy) must not be arbitrary, unfair or based on irrational considerations; in short they must be

connected to the objective. The Complainant argued that the Act is not arbitrary, unfair or based on irrational considerations. The Complainant submitted that the third step is that the means should impair as little as reasonably possible the right or freedom in question. The Complainant argued that the Act, with its exceptions and reliance on consent, impairs, as little as possible, the freedom of expression of organizations. The Complainant argued that the fourth step is that the effects of the law must be sufficiently important to override a *Charter* right (see step 1). The Complainant concluded that clearly the objective of protecting constitutionally protected privacy rights is of sufficient importance to warrant overriding an alleged corporate freedom of expression. Further, the Complainant argued that if section 7(1)(d) of the Act infringes section 2(b) of the *Charter*, it is saved by section 1 of the *Charter* as a reasonable limit prescribed by law as it can be demonstrably justified in a free and democratic society.

[para 38] Alberta, in examining the issue of the application of the *Charter* to the Act, provided an extensive review of related common and privacy law, the movement of privacy to legislated protection, a look at the *European Convention of Human Rights*, and a review of applicable federal and provincial laws and the *Charter*.

[para 39] Alberta examined the purpose of freedom of expression as set out in Supreme Court decisions such *Canadian Broadcasting Corp. v. Lessard*, [1991] 3 S.C.R. 421 and *Lavigne v. Ontario Public Services Employees Union*, [1991] 2 S.C.R. 211. Alberta also examined cases addressing privacy as a *Charter* value and referenced the Supreme Court decisions *Hunter v. Southam*, [1984] 2 S.C.R. 145, and *R. v. Duarte* [1990] 1 S.C.R. 30.

[para 40] Alberta argued that the clear intention of the Alberta Legislature, as indicated in *Alberta Hansard*, is to protect privacy in the private sector and to ensure that the provincial scheme, and not the federal scheme, applies to Alberta organizations (see the November 25, 2003 *Alberta Hansard* where Minister Coutts indicated that “If Alberta does not enact [PIPA] the federal private-sector act will govern personal information in Alberta’s private sector on January 1, 2004”).

[para 41] Alberta contended that the *Alberta Hansard* illustrates views of the Legislature regarding the pressing need for privacy legislation. In December 3, 2003 in *Alberta Hansard*, Minister Coutts stated that “Albertans value privacy of their personal information and want to ensure that this information is not used inappropriately by commercial organizations in the private sector”.

[para 42] The Act, according to Alberta, seeks to limit the use of personal information gathered by a corporation for a purpose other than for which it was collected, without the consent of the person identified by that information.

[para 43] Alberta argued, referring to section 3 of the Act, that the Act seeks to strike a balance between the right of an individual to have his or her personal information protected and the need of organizations to collect, use and disclose personal information for purposes that are reasonable. An example of this is found in section 4(3) of the Act

which lists a broad number of exemptions to the Act, the most notable being the collection, use or disclosure of personal information for journalistic purposes in section 4(3)(c) of the Act and for artistic or literary purposes in section 4(3)(b) of the Act.

[para 44] Alberta further argued that because of the balance struck in the legislation, under section 7(1)(d) of the Act, it is not inconsistent with the freedom of expression, which must be placed in context and balanced with the protection of privacy, that section 7(1)(d) of the Act is not a violation of the Organization's freedom of expression.

[para 45] Alberta also addressed a possible violation of the *Charter* under section 1 of the *Charter*. Alberta referenced *Irwin* and argued that on the balance of probabilities, any limitations on freedom of expression under the Act are justified under section 1 of the *Charter*. Alberta maintained that the right claimed is a low range of expressive activity: it is aimed at alerting one corporation of a possible (but denied) act of dishonesty, which may have an impact on the Complainant's employment contract.

[para 46] Alberta argued that: a) there is a sufficiently important objective in protecting the privacy of Alberta citizens and the national and international enactment of privacy legislation supports this conclusion; b) there is a rational connection between the legislation and the objective and there is a rational connection between section 7(1)(d) of the Act and the protection of privacy connected to the sufficiently important objective; and c) there is a minimal impairment of rights as the Act performs a balancing exercise between two *Charter* protected rights and values; privacy and freedom of expression.

[para 47] Alberta argued that the effect of restricting an organization from disclosing personal information without consent is proportionate to the objectives of the Act and that any breach of section 2(b) of the *Charter* is justified under section 1 of the *Charter*, as a reasonable limit, demonstrably justified in a free and democratic society.

[para 48] Alberta submitted that the case law dealing with freedom of expression and privacy requires that there is a need to balance the right of guaranteeing freedom of expression with the right of guaranteeing privacy. Alberta concluded that section 7(1)(d) of the Act does not prevent or frustrate the purposes of section 2(b) of the *Charter*, and the exceptions contained in sections 20 to 22 of the Act are a reasonable reflection of the *Charter* jurisprudence as they reflect a reasonable balance of the two *Charter* values of freedom of expression and privacy: see *Aubry v. Editions Vice Versa Inc.*, [1998] 1 S.C.R. 591.

[para 49] Alberta requested that the constitutional challenge to section 7(1)(d) of the Act be dismissed.

My decision

[para 50] I have reviewed the arguments and evidence before me and I find that section 3 of the Act seeks to strike a balance between the right of an individual to have

his or her personal information protected and the need of organizations to collect, use and disclose personal information for purposes that are reasonable.

[para 51] I base my finding on the balance struck in the legislation, under section 7(1)(d) of the Act, as it is not inconsistent with freedom of expression, which must be placed in context and balanced with the protection of privacy. I therefore find that there has not been a violation of the Organization's alleged freedom of expression under the *Charter*. I also find that section 7(1)(d) of the Act is not contrary to section 2(b) of the *Charter* and I will therefore now proceed to address the remaining issues.

ISSUE B: Was the Organization authorized to disclose the Complainant's personal information without consent, as provided by section 20(m) of the Act (disclosure reasonable for investigation or legal proceeding)?

[para 52] Section 20(m) of the Act reads:

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:...

(m) the disclosure of the information is reasonable for the purposes of an investigation or a legal proceeding;...

[para 53] Section 1(f) of the Act defines "investigations", as follows:

1 In this Act,...

(f)"investigation" means an investigation related to

(i) a breach of agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) circumstances or conduct that may result in a remedy or relief being available at law, if the breach, contravention, circumstances or conduct in question has or may have occurred or is likely to occur and it is reasonable to conduct an investigation;...

[para 54] Section 1(g) of the Act defines "legal proceedings" as follows:

1 In this Act,...

(g) legal proceeding" means a civil, criminal or administrative proceeding that is related to

(i) a breach of an agreement,

(ii) a contravention of an enactment of Alberta or Canada or of another province of Canada, or

(iii) a remedy available at law;...

[para 55] The Complainant and the Organization, in their submissions, both focused upon the definition of "investigation" as it applies to section 20(m) of the Act. The Complainant argued that at the time of the disclosure, there was no civil, criminal or administrative legal proceeding in progress. Although section 20(m) of the Act includes a

reference to legal proceedings, the evidence and arguments before me do not require me to address the application of the definition of legal proceedings to these circumstances.

[para 56] The Organization relied on sections 1(f)(i) and 1(f)(ii) of the Act as an exemption from the consent requirements of section 7(1)(d) of the Act in support of its disclosure of the Complainant's personal information under section 20(m) of the Act to a third party (the employer of the Complainant). In short, the Organization argued that it disclosed the information pursuant to an investigation that was related to a breach of the Complainant's employment agreement or in contravention of an enactment of Alberta or another province in circumstances where a breach or contravention may have occurred and it is reasonable to conduct a theft investigation.

[para 57] The Organization observed that section 1(f)(i) of the Act states that a breach of agreement refers to an agreement breached by an organization and an identifiable individual whose personal information is at issue. The Organization argued that the Act does not specify that the Organization has to have an agreement with the Complainant or be party to an agreement. Quoting the *Law Society British Columbia v. Mangat* [2001] 3 S.C.R. 133, the Organization argued that, because the Act does not specifically exclude all other parties, section 1(f) of the Act should not be restrictively interpreted as applying strictly between an organization and the identifiable individual.

[para 58] The Complainant argued that it must be proven on the balance of probabilities that the disclosure of the information was reasonable, and that the disclosure was for the purposes of an "investigation" as defined in the section 1(f) of the Act.

[para 59] The Complainant, referring to section 2 of the Act, argued that the standard under the Act is one of reasonableness or what a reasonable person would consider appropriate in the circumstances. The Complainant argued that the purpose behind the disclosure to a third party was not motivated by or for the benefit of the retail industry or the third party but was done in bad faith as a reasonable person would not consider it appropriate in these circumstances. Section 2 of the Act reads:

- 2 Where in this Act anything or any matter
 - (a) is described, characterized or referred to as reasonable or unreasonable, or
 - (b) is required or directed to be carried out or otherwise dealt with reasonably or in a reasonable manner,the standard to be applied under this Act in determining whether the thing or matter is reasonable or unreasonable, or has been carried out or otherwise dealt with reasonably or in a reasonable manner, is what a reasonable person would consider appropriate in the circumstances.

[para 60] The Complainant noted that as there is no evidence of an agreement between the Organization and the Complainant, a breach of an agreement could not have occurred as contemplated under section 1(f)(i) of the Act. The Complainant argued that the words of the section do not pertain to an agreement allegedly between the Complainant and the third party and therefore the contention of the Organization is not

legally tenable. The Complainant observed that even if one attempted to stretch the collective agreement to be an agreement contemplated in section 1(f)(i) of the Act to apply to the agreement the Complainant has with her employer, the Organization is not party to that agreement and therefore any allegation that there is an agreement with the Organization is not legally justifiable.

[para 61] The Complainant argued that the disclosure of the information to the employer of the Complainant was not made with a genuine intent to deter theft. The Complainant believed the Organization made the disclosure so that the Complainant would be disciplined or dismissed.

[para 62] The Complainant concluded that the Organization was not, in these circumstances, authorized to disclose the personal information of the Complainant.

[para 63] The Complainant argued that the disclosure occurred after the investigation and there was no legal proceeding. The Complainant contended that therefore the Organization cannot look to the definition found in section 1(f)(ii) of the Act to conclude that it disclosed the personal information pursuant to an investigation or a contravention of an enactment of Alberta or Canada or of another province.

[para 64] Further, the Complainant submitted that she could not see a relationship concerning an investigation and an enactment of Canada found in section 1(f)(ii) of the Act. The enactment alleged to have been breached is the *Criminal Code*, R.S.C. 1985, c.C-46 (“*Criminal Code*”), and the contravention is an alleged theft of the Organization’s property. The Organization and the Calgary City Police (the “Police”) were both capable of initiating an investigation. The Organization’s use and disclosure of the information to a third party (the employer of the Complainant who was unaffected by the investigation), is not a proceeding contemplated by the Act. The Complainant argued that the use of the information by the Organization for its own investigation was proper and the disclosure to the Police for a criminal investigation was also proper under sections 1(f)(ii) and 20(m) of the Act. However, the Complainant contended that when the Organization disclosed the personal information of the Complainant to a third party who was not directly affected by the alleged contravention of the *Criminal Code*, the disclosure was not done in accordance with the Act.

[para 65] Upon reviewing the evidence I do not see before me any evidence of an agreement between the Complainant and the Organization under section 1(f)(i) of the Act.

[para 66] I also note that, in Order F2002-024 an “investigation” has been defined in paragraph 31 as meaning to follow up step-by-step by patient inquiry or observation; to trace or track; to examine and inquire into with care and accuracy; to find out by careful inquisition; examination; the taking of evidence; a legal inquiry.

[para 67] Based on the evidence before me I accept that in this case the “investigation” was performed by the police, responding to an allegation of theft made by

the Organization and is an activity contemplated by section 1(f)(i) and 20(m) of the Act. I accept that the use of the personal information was proper for the investigation of the Organization and was properly disclosed to the police.

[para 68] I also accept that there is no evidence of charges being laid against the Complainant after the police investigation and no evidence of a contravention of a statute of Canada or Alberta as required under section 1(f)(ii) of the Act.

[para 69] I find that the disclosure by the Organization to the employer of the Complainant was not related to an investigation. Based on the facts and the circumstances, there is no evidence that the disclosure meets the criteria of section 1(f)(i) of the Act. I therefore find that section 20(m) of the Act does not authorize the Organization to disclose the personal information of the Complainant to her employer, without consent.

[para 70] If an adult person behaves badly or allegedly commits an offence in a store, in a bar, or on the street, the proper remedies involve dealing with the individual: expulsions from the premises or calling the police are in the forefront. Contacting the adult person's spouse, parents, brother, employer, etc. is a dangerous proposition for everyone. First, the person has not yet been found guilty of anything: we presume them to be innocent. Second, there are two sides to every story and reporting one side's views or suspicions of an event to a third party is not fair. What if the reporting party got it wrong? Third, it places the third party, in this case the employer, in the difficult position of having to "try" the person on the basis of incomplete evidence or hearsay evidence or appear not to care about the matter. We all care about social order and law enforcement but we have social mechanisms, law enforcement agencies and the courts, to judge people in a just and dispassionate way and determine guilt or innocence.

ISSUE C: If the Organization was not authorized to disclose as provided by section 20(m), was the Organization authorized to disclose the Complainant's personal information without consent, as provided by section 20(b) of the Act (disclosure pursuant to a statute of Canada that authorizes or requires disclosure)?

[para 71] Section 20(b) of the Act reads:

20 An organization may disclose personal information about an individual without the consent of the individual but only if one or more of the following are applicable:...

(b) the disclosure of the information is pursuant to a statute or regulation of Alberta or Canada that authorizes or requires the disclosure;...

...

[para 72] The Organization argued that the purpose of section 20(b) of the Act is to prevent creating a conflict between the Act and other statutes that authorize or require the disclosure of personal information. The Organization argued that the *Charter* qualifies as

a statute of Canada that requires disclosure, and if it does not qualify as a statute of Canada, then the Organization takes the position that section 2(b) of the *Charter* (freedom of expression) authorized the disclosure to a third party and basically moves into the same analysis and arguments regarding the application of section 2(b) as were made under the first issue.

[para 73] I note that for the purposes of applying section 20(b) of the Act, “the statute of Canada” being addressed in this Issue is the “*Constitution Act*”, 1982, Part I Canadian Charter of Rights and Freedoms (the “*Charter*”).

[para 74] The Complainant argued that the *Charter* does not expressly or impliedly authorize the Organization to disclose the Complainant’s personal information. Section 2(b) of the *Charter* does not require an organization to disclose personal information and does not impliedly authorize an organization to disclose personal information.

[para 75] The Complainant argued that for the Organization to successfully rely on the discretionary section 20(b) of the Act as a defence, it bears the burden to prove that section 2(b) of the *Charter* impliedly authorized the disclosure of the personal information of the Complainant to a third party and that it was practically impossible to avoid disclosing the personal information in exercising its alleged freedom of expression. This, the Complainant argued, is legally untenable.

[para 76] The Organization has not shown that in these circumstances the Charter authorizes or requires the disclosure of the Complainant’s personal information. I find that in these circumstances section 20(b) of the Act does not authorize the Organization to disclose the personal information of the Complainant, without consent.

V. ORDER

[para 77] I make the following Order under section 52 of the Act.

[para 78] I find that section 7(1)(d) (consent to disclose) of the Act does not contravene section 2(b) (freedom of expression) of the *Charter*.

[para 79] I find that section 20(m) (disclosure reasonable for investigation or legal proceeding) of the Act does not authorize the Organization to disclose the personal information of the Complainant, without consent.

[para 80] I find that section 20(b) (disclosure pursuant to a statute of Canada that authorizes or requires disclosure) of the Act does not authorize the Organization to disclose the personal information of the Complainant, without consent.

[para 81] As a result of my findings, I hereby order that the Organization immediately cease disclosing the personal information of the Complainant.

Frank Work, Q.C.
Information and Privacy Commissioner